Supreme Court, U.S.
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No. 05-289

IN THE
Supreme Court of the United States

TIMOTHY J. MILES,
Petitioner,
v.
H-QUOTIENT, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent's brief in opposition, while it focuses on the merits of the underlying issues, stands as an eloquent summary of why this Court should resolve the conflict among the circuits on the question of reviewability. The respondent has chosen to set forth its arguments on the soundness of the district court's remand order, but its brief demonstrates the purpose a grant of certiorari would accomplish. The issues contained in the respondent's brief would either be remanded for resolution by the court of appeals, or Congress would learn that the text of the Securities Litigation Uniform Standards Act (SLUSA), 15 U.S.C. § 77p, 78bb, must be augmented with additional language in order to effectuate its intention to completely preempt state-law securities fraud claims.

One issue in respondent's brief warrants a separate and specific response. Respondent states that petitioner misrepresented the nature of the state action, when in truth it is the respondent that has done so. Despite its protestations to the contrary in its brief, the respondent has characterized its fraud claim before the Fairfax Circuit Court as one based on the reliance of its shareholders and others. See Pet. 4. Without question, the nature of respondent's state law claim is in dispute, and the district court's evaluation of that dispute would be the subject for appellate review.

1. *The court of appeals' decision conflicts with decisions of another circuit.* Respondent incorrectly characterized the court of appeals' decision as it relates to the Seventh Circuit's ruling in *Kircher v. Putnam Funds Trust*, 373 F.3d 847 (7th Cir. 2004). In fact, respondent has mischaracterized *Kircher* itself. The Seventh Circuit determined that, in order to carry out Congress's intent, a district court's remand order under SLUSA must be reviewable by a federal court.[1] The Seventh Circuit went on to review, and reverse, the district court's ruling that SLUSA did not apply to that particular case. *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir. 2005) (*Kircher II*). Respondent has stated in its brief that "every circuit considering this issue has held that remand orders based upon findings that SLUSA did not preempt a state court action ... (was) not reviewable on appeal."
See 3 Brief in Opp. 4.

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[1] Two circuits have reached an opposite result. *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116 (2d Cir. 003); *United Investors Life Insurance Co. v. Waddell & Reed, Inc.*, 360 F.3d 960 (9th Cir. 2004). This case arises from a final judgment of the Fourth Circuit dismissing the appeal on the respondent's motion asserting a lack of jurisdiction.

In truth, the Seventh Circuit in *Kircher* reached the opposite conclusion. It did so after the district court ruled that SLUSA did not apply, finding that the claimed fraud was not "in connection with the purchase or sale of a covered security." *Kircher v. Putnam Funds Trust*, 2004 U.S. Dist. LEXIS 10327 (S.D. Ill. Jan. 27, 2004).[2] In its opposition, respondent also incorrectly characterized the basis for the district court's ruling. See Brief in Opp. 5.

2. *The issue presented here is critically important to the nation's business community, and a review is necessary to effectuate Congress's intent to completely preempt certain class-action securities fraud claims.* The respondent chose not to reconcile the doctrine of complete federal preemption with the facts of this case, stating only that preemption "is not implicated" by the remand order. See Brief in Opp. 5. Such reasoning begs the question of whether Congress intended a district court's evaluation to be final and not reviewable by a federal court. Indeed, the Seventh Circuit concluded that such a remand is made pursuant to SLUSA and thus falls outside the scope of 28 U.S.C. § 1447(c).

3. *The respondent's attempt to distinguish the Seventh Circuit's decisions mischaracterizes those decisions.* Respondent points to an observation in *Kircher* that the district court held that removal was proper. Apparently, the respondent misunderstood the Seventh Circuit's observation that the district court "proceeded to question how 77p(b) affects the litigation." *Kircher*, at 849. Precisely the same could be said of the district court's actions in this case, as it proceeded to question how SLUSA affects the litigation. The

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[2] In addition, the Seventh Circuit reviewed and reversed a SLUSA remand order in *Disher v. Citigroup Global Markets, Inc.*, 2005 U.S. App. LEXIS 17334 (7th Cir. Aug. 17, 2005).

only distinction is that in *Kircher*, the district court determined that the claim did not involve a "covered security" as defined by SLUSA, where this case involves a district court's determination that the claim does not involve a "covered class action."

* * * * *

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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